No. 11222.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COMPANIA CONSTRUCTORA BECHTEL-McCONE, S. A., a corporation,

Appellant,

vs.

DOYLE McDONALD,

Appellee.

PETITION FOR REHEARING.

RUSSELL H. PRAY, and
E. W. SHERIDAN,
620 Jergins Trust Building, Long Beach 2,
Attorneys for Petitioner and Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TABLE OF AUTHORITIES CITED

Cases.

Textbook.

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Comes now the above named Appellee, Doyle McDonald, and presents his Petition for Rehearing in this case:

I.

The opinion of this Court was filed on October 11, 1946. This Petition is filed within less than thirty (30) days thereafter, in accordance with the provisions of Rule 25 of the Circuit Court of Appeals for the Ninth Circuit. The jurisdiction of this Court has otherwise been established in accordance with the briefs heretofore filed by the Appellant and the appellee, under which the issues and the jurisdictional facts were agreed between the parties hereto.

II.

On re-analysis it is found that the Circuit Court of Appeals is in error upon the principal question of general law involved, which question was the controlling factor in this case. The error lay in the Court's conclusion that McAuliffe could not have known all of the facts, having heard only Appellee's side of the controversy. Under these circumstances he could not have waived or condoned Appellee's breach of contract, since a waiver is an intentional relinquishment of a known right. In support of which the Court cites *Johnson v. Zerbst,* 304 U. S. 458, at 464, and *Goold v. Singh,* 88 Cal. App. 399, at 343. In arriving at the above conclusion the Court completely disregards the evidence and the testimony of McAuliffe himself, in which he stated that on July 9th, following his interview with McDonald, he had interviewed Tam, Gratz and Vessels, in order to arrive at the basic facts of the dispute between Tam and McDonald. The Court further disregards the fact which must have been paramount in the mind of the trial court, who alone was in a position to view the witnesses, to judge of their credibility and to determine the nature of the men involved in this vital dispute, that these men were residing in a tight-knit community on an isolated island of the Pacific Ocean, where investigative facts could be unfolded in a matter of minutes, rather than in a matter of days conceived by the Circuit Court.

Mr. McAuliffe, throughout his testimony, did not at any time seek to deny that he had made a thorough investigation of all the facts, including this controversy, nor did he deny that he was fully apprised of all the facts upon which he felt that he was warranted in making the decisions which were finally made. After investigat-

ing from 2 o'clock in the afternoon of July 9th until 10 o'clock of the morning of July 10th, Mr. McAuliffe was in the position to finally make this statement as to the results of his investigation [see Rep. Tr. p. 217]:

> "Q. You saw no reason why he (McDonald) should be transferred? A. That is right.
>
> Q. And did you see any reason why he should be discharged? A. No."

It is upon the basis of this unequivocal affirmation by Mr. McAuliffe of his complete knowledge of the facts that the Appellee relied upon the case of *Goold v. Singh,* heretofore cited, for the principle of general law therein cited:

> "Where a party to a contract recognizes its continued validity, with full knowledge of facts discharging him or giving him the right of forfeiture, he waives the breach as an excuse for not continuing to perform."

To regard the above cited case as inapplicable or to distort its application to the facts in the instant case would constitute an usurpation by the Circuit Court of Appeals of the conclusive fact-finding powers of the trial court.

In addition to the conclusion of McAuliffe's investigation, the Court's attention is also invited to his testimony appearing at pages 193-194 of the Reporter's Transcript, which is set forth as follows:

> "Q. Didn't you make an investigation after you had this discussion with Mr. McDonald, the first one? A. I definitely did.
>
> Q. And did you make inquiry of anyone? A. Yes. I spoke to both Mr. Tam and Ed Gratz.

Q. Following your inquiries of Tam and Gratz, did you issue any instructions or give Mr. McDonald any reply: A. I issued instructions that McDonald go back to work.

Q. When did you do that? A. To the best of my memory, the following morning."

It was upon the basis of this testimony that the trial trial court properly found that the breach, if any, committed by McDonald had been condoned by the Appellant with a full knowledge of the facts warranting discharge and that this conduct of the Appellant constituted a waiver of the breach as an excuse for not continuing to perform. The second question which arises follows from the erroneous conclusion of the Circuit Court and that is that the conduct of the Appellant following its condonation of the breach by McDonald, if any, constituted a breach of contract in that the Appellant attached an unwarranted condition to its order requiring McDonald to return to work. This unwarranted condition constituted a prevention of performance by McDonald and justified the trial court's conclusion that this condition constituted one which was impossible in nature and gave rise to a breach of contract on the part of Appellant. That this finding by the trial court is correct in principle is supported in the case of *Woodruff v. Adams,* 134 Cal. App. 490, at page 495, where the court says:

"In an action for damages arising from prevention of performance of a contract, a notice by the defendant to the plaintiff to stop work until the defendant procured a loan constituted a prevention of performance where the plaintiff was ready, willing and able to continue with his work and was deterred

therefrom solely by the defendant, or his authorized agent, and not advised to continue within the period of approximately four months that ensued prior to filing suit."

In the instant case McDonald, according to the undisputed evidence, was at all times ready, willing and able to perform his portion of the contract and the sole deterrent to his performance was the arbitrary and improper refusal of the Appellant to fulfill its obligations under the contract to provide employment for McDonald, in conformity with Paragraph I of its Employment Agreement, which reads as follows:

> "Paragraph I. Time and Place of Service. Company hereby engages employee and employee hereby agrees to serve company as a boiler-maker (or in such other capacity as company may, from time to time require) in company's zone of operations for a period of eighteen months from the date employee shall report for duty at Bahrein, Persian Gulf, namely, ... As herein used 'Zone of Operations' is understood to mean Bahrein, Persian Gulf, and any other locality around the Persian Gulf to which employee may be transferred for service."

See, also:

> *Millsap v. National Funding Corporation*, 57 Cal. App. (2d) 772 at 777.

The Court violates the basic rule of contract construction in that it rigidly construes the instant contract in favor of the party drawing the contract, rather than pursuing the long established doctrine of this court that a contract will be construed most strictly against the framer

thereof. In no instance was the Appellee given the benefit of this rule in the decision heretofore filed. In that instance Appellee's rights materially suffered due to the court's error. The provision above cited created the obligation of McDonald to serve in a zone of operations anywhere in the Persian Gulf at the request of the Appellant and at any point to which he might be transferred for service. This provision also envisioned the possibility that the Appellee's services might be required in the function of boiler-maker, which was his specific craft, or in any other capacity which the company may, from time to time, require. Under this provision of the contract, even under the rigid if improper construction given it by the Court, the Appellant was under an obligation in fact, if not by implication, to provide employment for the Appellee at some point in the Persian Gulf where his relation with his immediate superior would be at least agreeable, if not pleasant. For the Court to determine that the Appellee was required by his contract to work under Tam, an admittedly inferior minion of the Appellant whose existence was not conceived by the parties at the time the contract was entered into, constitutes a most unrealistic conclusion.

When this principle is applied to the factual situation of heavy construction work being performed on a remote island, 8,000 miles in the Pacific, where the ruptures of human antipathies were accelerated by heat, disease, closeness to the job and inescapable proximities of man to man, it is inconceivable that the Court would require the Appellee to conduct himself under an utopian standard.

In view of the unequivocal affirmation by Appellant of its thorough investigation of the facts surrounding the purported altercation between McDonald and Tam, the trial court correctly ruled that the Appellant recognized the continued validity of the contract of employment with full knowledge of the facts, giving Appellant the right of forfeiture, and that Appellant therefore, by its conduct, waived the breach as an excuse for not continuing to perform. The evidence upon which this finding is based is uncontradicted and conclusive in character, and establishes a firm foundation for the affirmation of the decision of the trial court.

A correct ruling in accordance with the facts and the court decisions above quoted on the questions of general law herein cited could not have resulted in anything else except a different disposition of the case.

The above cited question is the controlling question in the instant case and the affirmative holdings herein cited are in direct conflict with the decision of this Court. The Court's attention is also requested to the case of *Stone v. Bancroft,* 139 Cal., page 78, and the case of *Stone v. Bancroft,* 112 Cal., page 652, at page 658; *Steelduct Company v. Henger-Seltzer Company,* 26 Cal. (2d), page 635 at page 646, where the Court says:

> "Annexing an unwarranted condition to an offer of performance is a refusal to perform."

Citing:

> *Loop Building Company v. DeCoo,* 97 Cal. App. 354, at page 364.

III.

It is further submitted on the question of damages that in accordance with the Appellee's Brief, heretofore filed, the trial court properly found on the basis of Appellee's damages herein. It is further submitted that the damages of Appellee are not based upon the question of breach or performance of the contract of employment herein, but that the compensation allowed by the trial court constituted dismissal compensation under a voluntary provision set forth in the contract of employment entered into between the parties hereto. It is further submitted that this dismissal compensation is due and payable for the purpose of defraying, in some small regard, the expense and loss of time to an employee necessarily incident to his being disqualified from performance under situations akin to the instant case where the employee's opportunity to mitigate the losses incident to his inability to perform are necessarily delayed for a period of, as here, one month, before he could again arrive in the United States and again resume remunerative employment.

The provision for dismissal compensation was contemplated by the parties as a necessary incident to the restoration of Appellee to a position of *status quo* where, regardless of fault, the termination of his contract would force upon him a loss which the company or Appellant itself estimated as involving at least one month's compensation. This element of damage is properly recoverable and that the trial court was correct in its award of that amount is set out in the case of *MacDuff v. Earl C. Anthony*, 8 Cal. App. (2d), page 209, and a copious citation of authority and annotation of the principle therein involved is set forth in 147 A. L. R. at page 151.

IV.

For the foregoing reasons the Petitioner respectfully urges that a rehearing be granted. That, upon further consideration, the decision of October 11, 1946, be revoked and that judgment enter for Appellee.

RUSSELL H. PRAY, and
E. W. SHERIDAN,
By E. W. SHERIDAN,
Attorneys for Petitioner and Appellee.

Certificate of Counsel.

I, E. W. Sheridan, counsel for the above named Appellee and Petitioner, Doyle McDonald, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

RUSSELL H. PRAY, and
E. W. SHERIDAN,
By E. W. SHERIDAN,
Attorneys for Petitioner and Appellee.